No. 82-1748

In the Supreme Court of the United States

October Term, 1982

STAN CARLIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, WHEN PROSPECTIVE JURORS INDICATE, IN RESPONSE TO VOIR DIRE QUESTIONS, THAT OUTSIDE PERSONAL AND BUSINESS COMMITMENTS MAY SO DISTRACT THEM THAT THEY CANNOT LISTEN TO EVIDENCE OR FAIRLY DELIBERATE, SUCH JUROR SHOULD BE STRUCK FOR CAUSE.

II. WHETHER A PETITIONER IS DEPRIVED OF A FAIR OPPORTUNITY TO DEFEND AGAINST THE GOVERNMENT'S ACCUSATIONS UNDER THE HOLDING OF CHAMBERS V. MISSISSIPPI, 410 U.S. 284 (1973), AND ITS PROGENY, WHERE HE IS PROHIBITED FROM OFFERING THE TESTIMONY OF A CONCEDEDLY UNAVAILABLE WITNESS WHOSE TESTIMONY WOULD DEPRIVE THE GOVERNMENT OF AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE.

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STAN CARLIN,

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PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE ELEVENTH CIRCUIT

_____

The petitioner, Stan Carlin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on February 22, 1983.

OPINION BELOW

The opinion of the Court of Appeals, which is unpublished (United States of America vs. Stan Carlin, No. 82-3105 (11th Cir., Feb. 22, 1983), appears in the Appendix hereto. The denial of Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc is as yet unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 22, 1983, affirming Petitioner's conviction of October 30, 1979. The Court of Appeals denied a timely Petition for Rehearing with Suggestion for Rehearing En Banc on April 18, 1983. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254(1).

LIST OF ALL PARTIES IN THE COURT BELOW WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Petitioner Stan Carlin is the only party in the court below whose judgment is sought to be reviewed.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury

of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner Stan Carlin was charged on May 1, 1979, in a five-count indictment alleging the interstate transportation of five fraudulent checks in violation of Title 18, U.S.C. §2314. Trial commenced in Atlanta, Georgia on September 10, 1979, and concluded in a guilty verdict on all counts on September 21, 1979.

On October 30, 1979, Petitioner was sentenced to imprisonment for six years, to serve a minimum of two years, pursuant to Title 18, U.S.C. §4205(b)(1), and a fine of $5,000.00 on Count I; six years' imprisonment each on Counts II through V concurrent with each other and with Count I; and a fine of $5,000.00 each on Counts II through V (for a total of $25,000.00).

Following denial of Petitioner's Motion for New Trial on February 10, 1982, he filed his appeal, which was denied on February 22, 1983. Subsequently, Petitioner filed a Petition for Rehearing With Suggestion for Rehearing En Banc, which was denied on April 18, 1983.

The facts of the case reflect that in November 1978 Petitioner Carlin opened up a checking account in his name at the Fulton National Bank in Atlanta, Georgia. Between January 25, 1979, and March 26, 1979, he deposited in this account five checks in the respective amounts of $83,927.16, $127,930.77, $219,641.22, $229,584.06 and $338,-916.79. These checks, which had been stolen from Brown & Root, Inc., of Houston, Texas, were drawn on that construction company's account at the Wachovia Bank in Greenville, North Carolina, payable to Carlin & Company. One of the two signa-

tures on each check was a forgery. Each check was hand delivered to Carlin in Atlanta by Donald Joseph (Joe) Vincz, a long-time acquaintance who resided in Indianapolis, Indiana.

Carlin testified that the Australian Government had issued to Minex, Inc., an "authority to prospect" (numbered 208P) for gas and oil on approximately sixteen million acres in Queensland, Australia. In early 1975, he purchased a one-half percent overriding royalty interest in the project from Minex, and in October 1976 acquired an additional one and one-half percent overriding royalty. He invested substantial funds in such project and expended time and money in unsuccessful efforts to interest investors, even though a successful well had been drilled resulting in huge, valuable natural reserves.

In the fall of 1978, Vincz entered the picture. Carlin, at his prompting, sent a proposal to Vincz in which he offered to sell his Australian holdings for sixteen million dollars. In turn, Vincz convinced Carlin that he had learned from his contacts in that firm that Brown & Root was interested in purchasing his interest. As he delivered each of the five checks, Vincz reiterated Brown & Root's continuing interest and represented that such checks were to be credited upon the final purchase price when agreed upon, following completion of the company's investigation of the Australian project. Out of the proceeds of the five checks, Vincz received in excess of $275,000.00 as a finder's fee.

Petitioner was subsequently arrested and, prior to trial, caused a material witness warrant to issue which resulted in the arrest of Donald

Joseph Vincz. While he was incarcerated, Vincz was interviewed by a defense investigator, retired F.B.I. Agent, O. Richard Hamilton, who explained to Vincz who he was and advised that he had been employed by attorneys representing Petitioner, who had been arrested and charged with cashing approximately $1,000,000.00 worth of checks which had allegedly been stolen from Brown & Root, Inc., in Corpus Christi, Texas. Vincz was told that Petitioner had stated he had received the checks from Vincz in response to a business proposition Vincz had made which consisted of finding someone to reopen an oil/gas well in Australia in which Petitioner had been previously involved. Hamilton testified (before the grand jury [App. Exs. 1 & 2]), inter alia, "I told Vincz that [Petitioner] ... said he offered a 25 percent -- and then I

stalled a minute and Vincz said 'finder's fee.' " (App. Ex. 1 at page 6). Vincz admitted to Hamilton that he gave the Brown & Root checks, which he received from a man in Texas, to Petitioner. Vincz also stated that all Petitioner knew was that the checks were in response to an agreement by Brown & Root, Inc., to work the oil and gas wells in Australia, and that Petitioner asked Vincz on several occasions after that whether he was going to receive a contract from Brown & Root. (App. Ex. 1 at page 8; R. 1, pp. 98-103; Supp.R. 2, p. 128; Supp.R. 6, p. 10).

At trial, Vincz, when called as a defense witness for the purpose of eliciting testimony that would reflect Petitioner dealt with Vincz in good faith, invoked his privilege against self-incrimination and refused to testify. Such refusal was sustained by the trial judge who, like-

wise, prohibited Petitioner from calling his investigator, Mr. Hamilton, to testify about his interview with Vincz, and who also refused to grant judicial immunity to the witness.

Additionally, while impanelling a jury to hear this case, the trial judge rejected Petitioner's motion to strike two jurors whose responses reflected that their interests in personal affairs could prohibit them from effectively listening to the evidence and rendering a fair verdict in the case.

BASIS OF JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction of the United States District Court for the Northern District of Georgia was invoked under the provisions of Title 18, United States Code, Section 3231.

REASONS FOR GRANTING THE WRIT

I. WHEN PROSPECTIVE JURORS INDICATE, IN RESPONSE TO VOIR DIRE QUESTIONS, THAT OUTSIDE PERSONAL AND BUSINESS COMMITMENTS MAY SO DISTRACT THEM THAT THEY CANNOT LISTEN TO EVIDENCE OR FAIRLY DELIBERATE, SUCH JURORS SHOULD BE STRUCK FOR CAUSE.

During voir dire of the prospective jury panel, the defense, in questioning potential jurors Bullock and Dickey (who had prior experience as a juror (R. 3, p. 128)), ascertained the effect that participation as a juror in the then estimated one-week proceeding (R. 3, pp. 135-136) (which lasted for two weeks) would have upon them, as follows (R. 3, pp. 131-132, 134-138):

> MR. LUDWICK: Is there anybody that would be so inconvenienced that as a practical matter they ... could not in

fairness ... serve in this trial?

. . . .

A JUROR: Mr. Bullock. My boss won't like it. My brother won't like it. I do extensive travel.

. . . .

I am supposed to be at a conference right now. We have meetings starting Thursday.

. . . .

MR. LUDWICK: ... is there anybody who feels that they could not fairly sit and listen to all the evidence and deliberate for whatever time it took?

. . . .

MR. DICKEY: Like I say, I honestly don't think I could keep my mind entirely on the case.

MR. LUDWICK: You feel, Mr. Dickey, if it went past Friday emotionally your mind would be elsewhere to the point where you could not listen to whatever evidence came after that point to deliberate ... .

MR. DICKEY: I am afraid so.

. . . .

MR. LUDWICK: I know you have a work obligation. Is it such your mind would be distracted that you would not give the attention--

MR. BULLOCK: As long as the company doesn't care, if the problem comes up, I have a problem. If it doesn't come up, I don't know.

MR. LUDWICK: ... if a problem comes up with the company and you were in the jury room deliberating you might rush your verdict more than normal in order to get out earlier ... .

MR. BULLOCK: Yes. I would want you guys to hurry up.

Petitioner moved to strike these two jurors for cause, which motion was denied. (R. 3, pp. 139-141). During the impanelling process, Petitioner struck those two jurors peremptorily, exercising all of his peremptory challenges. (R. 3, pp. 141-143; Supp.R. 9, p. 1). Such was done in recognition of the likelihood that Bullock and/or

Dickey, if selected as jurors, might be distracted and overlook crucial evidence or could become the champions of the government in the jury room in hastening a verdict of guilty rather than carefully pouring over all of the evidence in a search for the truth.

Error exists when the request to strike for cause is erroneously denied, and is not cured when the jurors are peremptorily stricken by the defense, an impairment of a substantial right requiring reversal. United States v. Boyd, 446 F.2d 1267 (5th Cir. 1971); Francone, et al. v. Southern Pac. Co., 145 F.2d 732 (5th Cir. 1944), reh'g. denied (1945).

There is not a judge who would fail to excuse a sleeping juror; so then, a judge should excuse a juror whose mental meanderings would, in effect, render him a sleeping juror. In either case, that juror is not considering the evidence and, there-

fore, cannot render a decision on what is presented in court. See, e.g., People v. Kurth, 216 N.E.2d 154 (S.Ct. 1966), reh'g. denied.

At stake is the Sixth Amendment guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... ." Here, the likelihood was great that the two jurors would not hear the evidence or render an impartial verdict. United States v. Caldwell, 543 F.2d 1333 (D.C. Cir.), reh'g. and reh'g. en banc denied, cert. denied, 423 U.S. 1087 (1976).

The function of challenge is to eliminate extremes of partiality on both sides, and to assure that jurors will decide the case on the basis of the evidence and not otherwise. Swain v. State of Alabama, 380 U.S. 202, reh'g. denied, 381 U.S. 921 (1965). Thus, if a juror cannot lay aside any

preconceptions about a case and try it solely on the evidence presented in court, it would be error to fail to dismiss such a juror for cause. Murphy v. Florida, 421 U.S. 794 (1975). Likewise, where a juror who, because of physical afflictions or, as here, outside interests, would be too distracted or otherwise unable to give attention to the proceedings, he should be struck for cause.

The answers of the two jurors reflected that outside commitments would cause their attention to stray to a degree that they could not "try it solely on the evidence presented in court" because they would not be listening to that evidence. Cf. United States v. Ross, 203 F.Supp. 100, 102 (E.D. Penn. 1962). Hence, the trial court should have struck the two prospective jurors for cause, rather than compelling Petitioner to strike them peremptorily. The panel opinion takes the position that

the trial judge was in the best position to determine the sincerity of the two jurors. In response, it is pointed out that neither the trial judge nor the prosecutor asked those two jurors any questions concerning this matter.

For the foregoing reasons, the trial court erred to the prejudice of Petitioner and the case should be reversed and remanded for retrial.

II. PETITIONER IS DEPRIVED OF A FAIR OPPORTUNITY TO DEFEND AGAINST THE GOVERNMENT'S ACCUSATIONS UNDER THE HOLDING OF CHAMBERS V. MISSISSIPPI, 410 U.S. 284 (1973), AND ITS PROGENY, WHERE HE IS PROHIBITED FROM OFFERING THE TESTIMONY OF A CONCEDEDLY UNAVAILABLE WITNESS WHOSE TESTIMONY WOULD DEPRIVE THE GOVERNMENT OF AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE.

Because the trial court declined to grant immunity to or allow him to call a concededly unavailable witness who refused to testify because

of possible self-incrimination, Petitioner moved to introduce the testimony of Mr. O. Richard Hamilton (a retired F.B.I. Agent) regarding his interview with that witness, Donald Joseph Vincz. (R. 1, pp. 98-103; Supp.R. 2, p. 128; Supp.R. 6, p. 10). Rule 804, Fed.R.Evid., provides:

> (b) Hearsay exceptions. -- The following are not excluded by the hearsay rule if the declarant is unavailable ... :
>
> . . . .
>
> (3) Statement against Interest -- A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

. . . .

> (5) Other exceptions - A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponant can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence ... .

The proposed testimony (as set forth in the grand jury testimony of Hamilton, App. Exs. 1 and 2) relates a conversation between Hamilton and Vincz following Vincz' arrest and incarceration pursuant to a defense material witness warrant. Hamilton explained to Vincz who he was and advised that he had been employed by attorneys representing Petitioner, who had been arrested and charged with cashing allegedly stolen Brown & Root, Inc., checks.

Vincz was told that Petitioner had stated he had received the checks from Vincz in response to a business proposition Vincz had made which consisted of finding someone to reopen an oil/gas well in Australia with which Petitioner had been previously involved. Hamilton testified (before the grand jury), inter alia, "I -- and then I stalled a minute and Vincz said 'finder's fee.' " (App. Ex. 1 at page 6). Vincz then admitted to Hamilton that he gave the Brown & Root checks, which he received from a man in Texas (Brown & Root's headquarters), to Petitioner. Vincz also stated that all Petitioner knew was that the checks were in response to an agreement by Brown & Root, Inc., to work the oil and gas wells in Australia, and that Petitioner asked Vincz on several occasions after that whether he was going to receive a

contract from Brown & Root. (App. Ex. 1 at page 8).

In its opinion, the Court of Appeals noted that the trial court found that the proffered statement was not against the penal interest of Vincz within the contemplation of Rule 804(b)(3), but assumed, arguendo, that such finding was clearly erroneous in that his admission of knowledge of and participation in the receipt and delivery of the Brown & Root checks would have probative value in a trial against him.

With this, the panel, in denying this claim of error, found an absence of Rule 804(b)(3) corroborating circumstances indicating the trustworthiness of the statement. Such view not only overlooks, but completely disregards Petitioner's testimony that such a business arrangement existed

between him and Vincz. It also ignores the testimony of Mr. Donald Ingram (who cashed two of the "finder's fee" checks Vincz received from Petitioner) (Supp.R. 6, pp. 151-175), and the testimony of Mr. Bruce Wilson, Vincz' house caretaker, who saw Brown & Root stationery in Vincz' house in Indianapolis, during the relevant period. (Supp.R. 6, pp. 179-184).

Based on the above, there can be no doubt that the requirements of Fed.R.Evid. 304(b)(3) and (5) were satisfied, justifying admission. At a minimum, the trial court could have sanitized the statement, striking exculpatory references to Petitioner, thus permitting admission of only those portions incriminating to Vincz.

Vincz' statements were material, exculpatory and crucial in view of the trial court's refusal to grant Vincz immunity to testify in Petitioner's

behalf. They substantiated Petitioner's testimony that he dealt with Vincz in good faith, believing he was selling his gas/oil interests to Brown & Root and paying Vincz a finder's fee, and would likely have resulted in Petitioner's acquittal inasmuch as a showing of lack of knowledge of the fraudulent nature of the checks would have denied the government of the essential element of intent necessary to obtain a conviction.

Alternatively, inasmuch as the district court was of the opinion that Vincz' statement was not against his penal interest, and the Court of Appeals assumed, arguendo (and rightfully so), that such finding was clear error, the case should be remanded to the district court with directions to the trial judge, who personally heard the evidence and viewed the demeanor of the witness, to make specific findings concerning whether sufficient

corroborating evidence exists to allow the admission of the Vincz' statement.

Irrespective of whether the "corroborating circumstances" requirement of Rule 804 is satisfied, the trial court's refusal to admit Vincz' statement into evidence, via investigator Hamilton, deprived Petitioner of "a fair opportunity to defend against the government's accusations" by depriving him of the only witness who could have produced evidence of his innocence, in violation of the mandate of Chambers v. Mississippi, 410 U.S. 284 (1973); Green v. Georgia, 442 U.S. 93 (1979).

Because of this due process requirement, the "corroboration" rule must be narrowly construed in favor of admissibility. To do otherwise denies Petitioner of sufficient opportunity to present his defense.

Analogously, in United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977), noting that, as here, the government refused to grant immunity to the participant, the court held that his statement to the defense investigator tended to place the declarant in a compromised position with respect to criminal liability and qualified as declarations against interest when the declarant invoked the Fifth Amendment at trial. Moreover, the court cited Chambers v. Mississippi, supra, to support its conclusion that appellant was denied "crucial substantiation of his asserted defense ... and thereby deprived ... of a fair opportunity to defend against the government's accusations."

The due process clause of the United States Constitution demands that a defendant in a criminal case be permitted to present matters in his defense. Here, there were only three methods by

which the exculpatory testimony of Vincz could come before the jury:

(a) by his testifying, which he refused to do, asserting self-incrimination;

(b) by compelling his testimony through the use of immunity, which the government and trial court refused to grant, or

(c) by the admission of the statement made to a reliable third-party (retired F.B.I. Agent O. Richard Hamilton).

Under the facts and circumstances of this case, fundamental fairness mandates that this case be reversed and remanded for retrial with instructions to admit the statement of the unavailable declarant, or, at a minimum, that it be remanded for findings by the trial court concerning the sufficiency of the corroborating circumstances to permit admissibility under the Rule.

CONCLUSION

This Petition for Writ of Certiorari is based upon issues of exceptional importance. The issues raised in this petition bring to the attention of the entire court precedent setting error which conflict with Supreme Court decisions which, at least as to one question, may present a matter of first impression.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Stan CARLIN, Defendant-Appellant.

No. 82-8105.

United States Court of Appeals,
Eleventh Circuit.

Feb. 22, 1983.

Before HILL and ANDERSON, Circuit Judges, and LYNNE,* District Judge.

LYNNE, District Judge:

Indicted on five counts of interstate transportation of stolen and forged securities,[1] Stan Carlin was found guilty on all counts by the verdict of a jury. He appeals from the judgment and sentence entered on October 30, 1979, and from the order denying his motion for a new trial, as supplemented with the permission of the Court,

entered on October 30, 1979, and from the order denying his motion for a new trial, as supplemented with the permission of the Court, entered February 10, 1982. We affirm.

On November 6, 1978, Carlin opened up a checking account in his name at the Fulton National Bank in Atlanta, Georgia.[2] Between January 25, 1979, and March 26, 1979, he deposited in this account five checks in the respective amounts of $83,927.16, $127,930.77, $219,641.22, $449,584.06, and $338,916.79, totaling exactly one million dollars. These checks, which had been stolen from Brown & Root, Inc., of Houston, Texas, were drawn on that construction company's account at the Wachovia Bank in Greenville, North Carolina, payable to Carlin & Company. One of the two signatures on each check was a forgery. Each check was hand delivered to Carlin in Atlanta by Donald

Joseph (Joe) Vincz, a long time acquaintance who resided in Indianapolis, Indiana.

Carlin's explanation of these check transactions was obviously not credited by the jury. In brief summary, his contentions proceeded along these lines: the Australian Government had issued to Minex, Inc., an "authority to prospect" (numbered 208P)[3] for gas and oil on approximately sixteen million acres in Queensland, Australia. In early 1975, he purchased a one-half percent overriding royalty interest in the project from Minex, and in October, 1976, acquired an additional one-half percent overriding royalty. He invested substantial funds in such project and expended time and money in unsuccessful efforts to interest investors.

In the fall of 1978, Vincz entered the picture. Carlin claimed to have sent a proposal to

Vincz in which he offered to sell his Australian holdings for sixteen million dollars. In turn, Vincz advised Carlin that he had learned from his contacts in that firm that Brown & Root was interested in purchasing his interest. As he delivered each of the five checks, Vincz reitereated Brown & Root's continuing interest and represented that such checks were to be credited upon the purchase price when agreed upon.[4] Out of the proceeds of the five checks, Vincz received in excess of $275,000, purportedly as a finder's fee.

We now turn serially to the issues raised on this appeal.

I. CHALLENGES FOR CAUSE.

Appellant's contention that the trial court erred in denying the challenges of jurors Bullock and Dickey "for cause" is predicated entirely upon their responses to questions asked during voir

dire of the jury panel.[5] The statutory disqualifications of jurors in the federal system appear in 28 U.S.C. § 1856(b). The suggestion that these two jurors should have been disqualified pursuant to 28 U.S.C. § 1865(b)(4) is unsupported by the record and is patently frivolous.

[1,2] Determinations as to the impartiality of a juror are committed to the discretion of the trial judge and will not be grounds of reversal absent an abuse of discretion. United States v. Salinas, 654 F.2d 319 (5th Cir. 1981). From the equivocal answers of the challenged jurors to loaded questions and from their failure to make any response to a question propounded to the entire panel[6] the trial court could have reasonably inferred that they were not biased but merely wished to be spared the inconvenience or economic loss resulting from jury service in a protracted

trial. We conclude there was no abuse of discretion.[7]

II. CLAIMS OF FIFTH AMENDMENT PRIVILEGE

During the trial, Appellant called Gummell, Griffin and Vincz as witnesses. Upon questioning by the court outside the presence of the jury, each stated that, upon advice of retained counsel, he would claim his Fifth Amendment privilege. Thereupon, without having conducted an in camera inquiry about the validity or scope of such claims, the court called each of them to the stand and asked each of them if he would answer any questions. When each responded in the negative, he was dismissed. Appellant's claim of error is predicated upon the trial court's failure to follow the teaching of United States v. Goodwin, 625 F.2d 693, 700 (5th Cir. 1980). On its facts, the case sub judice is clearly disting-

uishable.

In Hoffman v. United States, 341 U.S. 479, 486-487, 71 S.Ct. 814, 818-819, 95 L.Ed. 1118 (1951), the Supreme Court explained that:

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal preception of the pecularities of the case as by the facts actually in evidence." [Citations omitted].

[3] It is obvious from the facts on the

record[8] that each of these witnesses had legitimate grounds for asserting his privilege against self-incrimination. Since the facts actually in evidence established that Gummell, Vincz, and Griffin had some connection with the stolen checks, the trial judge properly assumed that they were at least vulnerable to criminal charges related thereto. He did not abuse his wide discretion in sustaining the privileges. United States v. Melchor Moreno, 536 F.2d 1042, 1050 (5th Cir. 1976).

III. REFUSAL TO GRANT JUDICIAL IMMUNITY

Appellant contends that, after the Fifth Amendment claims of Gummell, Vincz, and Griffin had been sustained, the trial court erred in denying his oral and written motions that they be granted judicial use immunity in order that he might elicit from them exculpatory testimony[9] unavailable from other sources. United States

v. Thevis, 665 F.2d 616 (5th Cir. 1982), is controlling here. In addressing the due process claim urged upon us, the Court observed:

> We conclude, however, after reviewing the various circuit opinions and conflicting policy arguments, that district courts may not grant immunity to defense witnesses simply because that witness has essential exculpatory information unavailable from other sources. Id. at 639.

Since the record reveals no governmental abuse of the immunity process we pretermit any discussion of what effect, if any, prosecutorial misconduct would have in providing an exception to the foregoing rule.

IV. REFUSAL TO ALLOW HEARSAY TESTIMONY

Relying upon the hearsay exception provided

by Federal Rules of Evidence, Rule 804(b)(3),[10] 28 U.S.C., Appellant moved the admission of a statement made by Vincz,[11] concededly unavailable as a witness. In denying such motion, the trial court found that the proffered statement was not against the penal interest of Vincz within the contemplation of Rule 804(b)(3). Assuming, arguendo, that this finding was clearly erroneous in that his admission of knowledge of and participation in the receipt and delivery of the Brown & Root checks would have probative value in a trial against him, we turn to the requirement that corroborating circumstances clearly indicate the trustworthiness of the statement.

[4] Since the trial court made no explicit finding as to the existence vel non of such circumstances, we have carefully reviewed the record, United States v. Thomas, 571 F.2d 285, 290 (5th

Cir. 1978), which reveals no corroborating circumstances remotely indicating the trustworthiness of the statement. There was no error in its exclusion.

[5] The remaining issues require little discussion. After Carlin testified on direct examination that in 1978 he applied for two used car dealer licenses and introduced such licenses into evidence, the prosecution, over his timely objection, was permitted to cross-examine him as to the truthfulness of his answer on his verified application therefor that he had not been convicted of a felony. In this ruling we find no abuse of discretion. Rule 608(b)(1), Federal Rules of Evidence (28 U.S.C.).

Appellant's objection to the court's charge on "knowledge" was not well taken.[12] Such charge was identical to the charge approved in United

States v. Callahan, 588 F.2d 1078, 1082 (5th Cir. 1979).

AFFIRMED.

F O O T N O T E S

* Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

1. 18 U.S.C. § 2314.

2. Although Carlin insisted that it was opened as a business account for his timber business, there was no activity in such account until January 25, 1979.

3. 208P stated on its face that it was issued for a period of four years commencing June 1, 1973.

4. Carlin had seen no contracts, correspondence, documentation, or communication from Brown & Root and had no contract or correspondence with Vincz.

5. MR. LUDWICK: Is there anybody that would be so inconvenienced that as a practical matter they ... could not in faireness [sic] ... serve in this

trial:

. . . .

A JUROR: Mr. Bullock. My boss won't like it. My brother won't like it. I do extensive travel.

MR. LUDWICK: Do you expect to do traveling?

MR. BULLOCK: We schedule things as far as six months ahead. I am supposed to be at a conference right now. We have meetings starting Thursday.

MR. LUDWICK: You feel you can serve through Friday?

MR. BULLOCK: I can make it through Friday.

. . . .

MR. LUDWICK: Is there anybody who feels that no way ... they could sit through a trial and listen to the evidence and sit through deliberations ... that these other obligations are so overpowering they could not make the necessary sacrifices to stay?

. . . .

MR. LUDWICK: ... is there anybody who feels that they could not fairly sit and listen to all the evidence and deliberate for whatever time it took?

. . . .

MR. DICKEY: Like I say, I honestly don't think I could keep my mind entirely on the case.

MR. LUDWICK: You feel, Mr. Dickey, if it went past Friday emotionally your mind would be elsewhere to the point where you could not listen to whatever evidence came after that point to deliberate ... .

MR. DICKEY: I am afraid so.

. . . .

MR. LUDWICK: I know you have a work obligation. Is it such your mind would be distracted that you would not give the attention---

MR. BULLOCK: As long as the company doesn't care, if the problem comes up, I have a problem. If it doesn't come up, I don't know.

MR. LUDWICK: ... if a problem comes up with the company and you were in the jury room deliberating you might rush your verdict more than normal in order to get out earlier ... .

MR. BULLOCK: Yes. I would want you guys to hurry up.

6.

MR. LUDWICK: Is there anybody who is not willing to accept the Court's instructions that you have to wait until all the evidence is in and deliberate with the other jurors before you reach a conclusion?

7.

We are in accord with the statement:

There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury. United States v. Ploof, 464 F.2d 116, 118 n. 4 (2nd Cir. 1972) cert. denied, 409 U.S. 952, 93 S.Ct. 298, 34 L.Ed.2d 224 (1972).

8.

In sustaining the claim of privilege, the court had before it the following severely capsulated facts:

1. Each of the five checks involved appeared to bear the signatures of D. L. Dickey and Jay A. Griffin. There was testimony that Dickey's signature was a forgery and that Griffin had signed at least three of the checks.

2. The five stolen checks were drawn on an account for which the Corpus Christi office of Brown & Root had responsibility. Griffin worked in that office.

3. Carlin received the stolen checks from Vincz.

4. Vincz and Gummell had made frequent calls to each other.

5. Gummell occupied a supervisory capacity in the security department of Brown & Root and was a close friend of Griffin who, in his administrative capacity, had access to checks in blank form.

6. Gummell's fingerprints were on the check stubs although he had no occasion to have access to such checks.

7. Vincz admitted to O. Richard Hamilton, a private investigator, according to Hamilton's testimony before the grand jury, that he had obtained the Brown & Root checks from Gummell and had paid him a portion of the money which he received from Carlin.

9.

Counsel for Carlin proferred that, if immunized, Griffin would testify that he did not know and had never even heard of Carlin; that Gummell would testify that he had neither heard of nor spoken with Carlin, and that Vincz would testify that Carlin was unaware of any wrongdoing and was led to believe he was involved in a legitimate transaction with Brown & Root.

10.

As here pertinent such exception reads:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * * *

(3) Statement against interest. A statement which was at the time of its making ... so far tended to subject him to ... criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissable [sic] unless corroborating circumstances clearly indicate the trustworthiness of the statement.

11.

It was submitted that Hamilton, Carlin's private investigator, would testify in substance that, prior to the trial, he interviewed Vincz who was incarcerated pursuant to a material witness warrant obtained by defendant; that Vincz admitted that he delivered to Carlin the Brown & Root checks, which he had received in Texas; that Carlin had offered him a 25 percent

finder's fee for producing someone to reopen an oil and gas well in Australia; that all Carlin knew was that the checks were in response to an agreement by Brown & Root to work such well, and that Carlin asked him on several occasions after that whether he was going to receive a contract from Brown & Root.

12. The court charged: "Now the element of knowledge may be satisfied by inferences from proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the facts. It is entirely up to you as to whether you find any deliberate closing of the eyes and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge."

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-8105

D.C. Docket No. CR-79-00117-01

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STAN CARLIN,

Defendant-Appellant.

Appeal from the United States District Court
for the
Northern District of Georgia

Before HILL and ANDERSON, Circuit Judges, and LYNNE*, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

February 22, 1983

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*Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

ISSUED AS MANDATE:

A 20

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-8105

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STAN CARLIN,

Defendant-Appellant.

Appeal from the United States District Court
for the
Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 22, 11 Cir., 1983, ___F.2d___).
(April 18, 1983)

Before HILL and ANDERSON, Circuit Judges, and LYNNE*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge)

*Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.